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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 26 *of* 1873,

DÁDIBHÁI JAHÁNGIRJI ... ...*Plaintiff and Appellant.*
RÁMJI BIN BHÁU and
others ... ...*Defendants and Respondents.*

Shilotri lands—Inamdars—Regulation I. of 1808, *Sec.* 4 *Right of Inamdars to raise the assessment on Shilotri lands–Prescriptive right of Inamdars to recover from Shilotridars the revenue formerly paid by the latter to Government.*

Government, by an indenture dated the 25th January 1819, conveyed to *A* and *B* and their heirs and assigns certain villages in the Island of Salsette, with the exception of such spots of *Shilotri* tenure as might be therein, or on any part thereof, which could only become the property of *A* and *B*, on their purchasing the same from the proprietors. Since 1819 the holders of these *Shilotri* lands had paid to the grantees and their heirs assessment (or rent) at a fixed rate which, before the grant, they used to pay to Government. In an action brought by an heir of *A* and *B* in 1868 to recover an enhanced rent or assessment levied on these lands :

Held that the effect of the exception in the Indenture of 1819 being to throw upon the plaintiff the burden of proving his right to enhance the rent (or revenue), which he had failed to do, and Regulation I. of 1808, Section 4, clauses 1 and 2, containing admissions by Government (which then was the immediate landlord of the *Shilotridars*), that Government itself had no such right, plaintiff was consequently not entitled to raise the rent.

Held also that though the language of the exception was so large that it might have been construed to exclude any right on the part of the grantees to receive rent (or revenue), yet that as the defendant or his predecessors had, ever since 1819, paid to the plaintiff and his predecessors the revenue paid before that time to Government, that revenue passed under the Indenture of 1819 to the grantees in the deed.

THIS was a special appeal from the decision of G. Averst, Assistant Judge at Tanna, affirming the decree of the Subordinate Judge of the same place.

The special appeal was argued before WESTROPP C.J., and KEMBALL, J., on the 2nd September 1874.

Macpherson (with him *Shantaram Narayan*) for the appelant.

Vishvanath Narayan Mandlik for the respondent.

WESTROPP, C.J.:--In this case, the sole question is, whether the plaintiff, who is *Inamdar* of (amongst other villages) the village of Dahisur or Dyenseer, in the Island of Salsette, is entitled to raise the rent (or revenue assessment) payable to him in that capacity by the defendant, who is the occupant of certain lands in that village. There was also in the courts below a question whether the lands, the subject of the present claim, are *Shilotri* lands, which question has, in both of those courts, been determined in the affirmative, and it has been admitted by the learned counsel for the appellant (plaintiff) that he cannot, on special appeal, dispute that finding. Silotri *alias* Shilotri *alias* Shelowtr *alias* Serrotore lands are mentioned in Section 4 of Regulation I. of 1808 as follows:—

"*First.*--There has existed from that time (the period of the acquisition by the British of the Island of Salsette (Sashti) in A.D. 1744 by conquest) a description of landed property, under the denomination of Shelowtr (called also Serrotore), and consisting of lands said to have been acquired by the natives on favourable terms of tenure, by purchase from their Portuguese masters, which property has been respected throughout the subsequent revolutions.

"*Second.*--Another description of Shelowtr tenure consists of certain spots of ground gained from the sea by embankment, or brought into cultivation from the jungle or forest, at the personal expense of individual, who have thence continued to pay thereon, in several instances, a fixed quit-rent without reference to the produce."

Section 36 of the same Regulation in its 9th 10th, 11th, 12th, 13th, and 15th clauses, and Section 59, take a distinction between Serrotore holdings of white batty ground (chowka) and Serrotore holdings of black batty ground, otherwise styled khara or salt batty ground, which is probably the same distinction as that taken in Section 4, already quoted. The 48th section of the same Regulation shews that Government, in making a grant of lands in the village

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of Powey and other villages in the same Island in A.D. 1799 to Mr. Helenus Scott, expressly excepted such parts thereof as were of Serrotore tenure, and, in that exception, took no distinction between white and black batty ground.

The present plaintiff claims to be *Inamdar* as son of Jahángir Ardasir. Cursetji Ardasir and Jehángir Ardasir were the sons of Ardasir Dady, with whom Government had agreed to exchange the village of Dahisur and other villages in Salsette for certain lands in the Island of Bombay.

Ardasir Daly having died before that agreement was carried into effect, Government, by an Indenture of exchange, dated the 25th January 1819, executed in pursuance of that agreement conveyed the village of Dahisur (which was there described as containing 27 parahs and 18½ adolies of black batty ground and 197 morahs, 1 parah, and 6½ adolies of white batty ground) and the said other villages in Salsette to Cursetji Ardasir and Jahángir Ardasir and their heirs and assigns, 'with the exception of such spots of Serrotore tenure as may be therein or on any part thereof, which can only be the property of the said Cursetji Ardasir and Jehángir Ardasir on their purchasing the same from the present proprietors thereof."

The Assistant Judge has not only found that the lands, the rent of which is sought to be enhanced by this suit, are *Shilotri* lands, but that they were so previously to the date of the Indenture of the 25th January 1818, which finding is admitted by counsel to be conclusive on this Court. The defendant, in his written statement, admits that, for upwards of thirty years before the bringing of this suit, he has paid assessment on his *Shilotri* land to the plaintiff at a fixed rate.

It is in fact now admitted on both sides, that the rate at which assessment on the defendant's lands was paid to Government before the grant (in exchange) of Dahisur, &c., to the defendant's ancestors in 1819, was 5 rupees, 2 annas, 2 pies, and that the same rate has been since paid to those gran-

tees, without variation, down to 1863-64 when the attempt was made by the plaintiff to raise the rent in conformity with the new valuation then made by the survey officers of Government, and that there is not any evidence of any different rate having been at any time whatever paid by the *Shilotri-dars* (including the defendant) to Government.

Both of the courts below have found that, under the above circumstances, the plaintiff is not entitled to raise the rent, and the question for our decision is whether or not that ruling is right in law.

The language of the exception in the Indenture of 1819 is very large, and might perhaps, is the absence of proof of payment of rent by the defendant and his predecessors, have been construed to exclude any right on the part of the grantees even to receive rent (or revenue) in respect of *Shilotri* lands. The exception does not make any distinction between the *Shilotri* lands described in the first clause of Section 4 of Regulation I of 1808, and those described in the second clause of the same section, nor between white and black *Shilotri* batty ground, and in both of those respects the exception in the Indenture of 1819 tallies with the description, given in Section 48, of the exception in the grant of 1799 of the village of Powey to Mr. Helenus Scott. The Regulation of 1808, however, shows that *Shilotri* lands (both of white and black batty) paid revenue to Government, and it appearing that, ever since 1869, the defendant on his predecessors in the *Shilotri* holding have not paid revenue to Government, but have, without question, paid regularly to the plaintiff and his ancestors the rent or revenue of Rs. 5-2-2, which had previously been paid to Government, we think we are bound to hold that the right to that revenue passed under the Indenture of 1819 to the grantees in that deed. But we are clearly of opinion that the effect of the exception was to preserve to the *Shilotridar* his rights over the land as they then stood, and that the burden is thereby cast upon the plaintiff to prove his right to enhance the revenue, and that he not only has failed to prove any such right on his part, but that

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the first and second clauses of Section 4 of Regulation I of 1808 contain admissions by Government (which then was the immediate landlord of the *Shilotridars*) tending to show that Government had not any such right. Under these circumstances, we must affirm the decree of the Assistant Judge with costs.

Decree affirmed with costs.

[APPELLATE CRIMINAL JURISDICTION.]

REG. v. SAKHARAM MUKUNDJI and three others.

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The Indian Evidence Act. I. of 1872, Secs. 5, 11, 153, 155 and 165—Cross Examination of a witness after his examination by the Court—Trial by Jury—Evidence properly admitted withheld from the Jury—New trial.

The principal that parties cannot without the leave of the Court, cross examine a witness whom, the parties having already examined or declined to examine, the Court itself has examined, applies equally whether it is intended to direct the cross-examination to the witness's statements of fact, or to circumstances touching his credibility, for any question meant to impair his credit, tends (or is designed) to get rid of the effect of each and every answer, just as much as one that may bring out an inconsistency or contradiction, Section 155 of Act I. of 1872.

The statement of a witness for the defence that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, where the latter states he was and saw the accused persons, is properly admissible on evidence, even though the witness for the prosecution may not himself have been cross-examined on the point, Sections 5, 11, and 153 (Illustration C) of Act I. of 1872.

Where such a statement, after being admitted, was withheld from the Jury, the High Court ordered a new trial.

THE four accused persons were tried and convicted of the offences of mischief by fire and being members of an unlawful assembly, by N. Daniell, Acting Session Judge of Poona, and a Jury, and sentenced, for the former offence, to five years, and for the latter to six months' rigorous imprisonment.

The material facts are as follows :-

The accused were charged with having set fire to a Máhárwádá of the village of Wáhle. After examining